

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IMAN MCINTOSH,

Plaintiff,

14 CV 0051 (FB) (RML)

-against-

THE CITY OF NEW YORK, POLICE OFFICER
HAROLD TAYLOR, SERGEANT HONG CHEN, POLICE
OFFICER CHONG YI, POLICE OFFICER JAWAD
JAVED, POLICE OFFICER JAMES KELLY, POLICE
OFFICER FRANCISCO SANSIVIERI, POLICE OFFICER
JASON RAGOO, SERGEANT RONALD WARNETT,
AND JOHN/JANE DOE # 1 - 20,

Defendants.
-----x

MEMORANDUM OF LAW IN SUPPORT



LAW OFFICE OF GREGORY P. MOUTON, JR., LLC

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted in support of Plaintiff's application seeking an Order striking Defendants' Answer to Plaintiff's Second Amended Complaint ("ASAC"), found at Docket Entry No. 52. As set forth within, Defendants failed to timely file the ASAC, and did not obtain leave of Court or consent from Plaintiff to file the ASAC. As such, the ASAC was improperly filed and should be stricken.

ARGUMENT

On January 6, 2014, Ms. McIntosh commenced this action with the filing of her Complaint against Defendants City of New York and Harold Taylor. See Complaint, Docket Entry No. 1. Defendants City of New York and Harold Taylor answered the Complaint on March 26, 2014. See Answer to Complaint, Docket Entry No. 7.

On October 30, 2014, Ms. McIntosh filed her First Amended Complaint via ECF against Defendants City of New York, Harold Taylor, Hong Chen, Chong Yi, Jawad Javed, James Kelly, Jason Ragoo, and Ronald Warnett. See First Amended Complaint, Docket Entry No. 15. Having previously appeared in this action, Defendants City of New York and Harold Taylor were served with the First Amended Complaint on October 30, 2014. On January 2, 2015, Defendants Hong Chen, Chong Yi, Jawad Javed, James Kelly, Jason Ragoo, and Ronald Warnett appeared in this matter through their then attorney, Ryan Shaffer, Esq., but did not file an answer to the First Amended Complaint.¹

¹ Defendants Hong Chen, Chong Yi, Jawad Javed, Jason Ragoo, and Ronald Warnett were also served with the First Amended Complaint. See Affidavits of Service, Docket Entry Nos. 20 – 24.

On February 23, 2015, Ms. McIntosh filed her Second Amended Complaint via ECF against Defendants City of New York, Harold Taylor, Hong Chen, Chong Yi, Jawad Javed, James Kelly, Jason Ragoo, Ronald Warnett, and Michael Elderbaum. See Second Amended Complaint, Docket Entry No. 27. Having previously appeared in this action, Defendants City of New York, Harold Taylor, Hong Chen, Chong Yi, Jawad Javed, James Kelly, Jason Ragoo, and Ronald Warnett were electronically served with the Second Amended Complaint. Defendants Kelly and Elderbaum were also physically served with the Second Amended Complaint. See Affidavits of Service, Docket Entry Nos. 31 and 32.

For over a year, Defendants failed to timely file their answers to the Second Amended Complaint, and failed to request leave of the Court or consent from Plaintiff to file a late answer to the Second Amended Complaint. Defendants hastily attempted to rectify their default by filing their ASAC on June 1, 2016, after being served with Plaintiff's motion for a default judgment and summary judgment, but did so without requesting leave of the Court or consent from Plaintiff. See ASAC, Docket Entry No. 52.²

Defendants' ASAC was improperly filed. FRCP Rule 12 provides that "[a] defendant must serve an answer... within 21 days after being served with the summons and complaint." Fed. R.

² In their haste to file an answer to the Second Amended Complaint, Defendants filed an answer on June 1, 2016, that is dated February 25, 2015, and is purportedly electronically signed by Ryan Shaffer, Esq., former attorney for Defendants (see p. 16 of the ASAC), but filed by Karl Ashanti, Esq., the current attorney for Defendants. Under EDNY's ECF policies, Mr. Shaffer would have needed to file the document under his login and password for the electronic signature to constitute his signature. See cm/ECF User's Guide, Declaration of Gregory Mouton dated June 13, 2016, Exh. 3 at p. 3 (login and password are electronic signature). As such, this document is not properly signed under FRCP Rule 11(a) and should be stricken for that reason, as well.

Civ. P. Rule 12(a)(1)(A). Defendants' answer was filed approximately 1 year and 2 months after it was due.³

Defendants have failed to obtain leave of the Court, or even consent from Plaintiff to file the ASAC. As such, its filing was improper and the ASAC should be stricken. See, e.g., Chevron Corp. v. Salazar, Nos. 11 Civ. 3718 (LAK) & 11 Civ. 0691 (LAK), 2011 WL 3628843, *3 (S.D.N.Y. Aug. 17, 2011) (finding that the filing of an answer outside the time from allowed by the FRCP and without Court leave was improper and should be stricken).

CONCLUSION

For all the foregoing reasons, Ms. McIntosh requests that the Court issue an Order striking the Answer to the Second Amended Complaint found at Docket Entry No. 52, as well as such other and further relief as the Court may deem just and necessary.

Dated: New York, New York
June 13, 2016

/s/
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³ This is based on the date of the last served defendant. As such, for defendants who were served, for instance, electronically, this time is greater.

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